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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MICHAEL C. MAYS, *Petitioner,*

vs.

STATE OF WASHINGTON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN GAVIN
Counsel for Petitioner Mays.

LEO C. KENDRICK
Of Counsel for Petitioner Mays.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Michael C. Mays prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington affirming his conviction of second degree murder and the life sentence given him.

OPINION BELOW

The nine judge en banc opinion of the Supreme Court of the State of Washington (Appendix A, page 12) was filed October 8, 1964. The Court by a majority denied petition for rehearing (Appendix B, page 28) which denial was filed January 5, 1965.

JURISDICTION

The execution and enforcement of the final judgment of the Supreme Court of the State of Washington was timely stayed until February 4, 1965 by an order of the Supreme Court of the United States signed by Associate Justice W. O. Douglas on January 7, 1965 (Appendix C, page 29). The order approving the bond therein provided is attached (Appendix D, page 31).

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

The constitutional questions were raised in the trial court by exceptions to instructions given by the Court. All instructions applicable or referred to in this petition are set forth in Appendix E, page 34. (The specific exceptions and arguments thereon are found in R. 1125, 1129, 1134, 1167 - 1277.*) See also Appellant's brief pages 26-27 (Appendix F, page 37), Appellant's Statement of Additional Authorities pages 1 and 2 (Appendix G, page 38), Appellant's Petition for Rehearing, pages 41 through 48, 53, 54, 55, 56, 58, 59, 63, 64 (Appendix H, page 41). all of which arguments were rejected or ignored by the Court in its opinion (Appendix A, page 12) and Court's Order Denying Rehearing (Appendix B, page 28).

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*The parenthetical numbers prefaced by the letter R refers to pages of the certified record on appeal to the Supreme Court of the State of Washington.

QUESTIONS PRESENTED

1. Whether a defendant on trial for murder can by instructions be deprived of his constitutional "presumption of innocence".

2. Whether in a capital case presumption instructions can be used instead of proof of specific intent, thereby:

a. Relieving the State of the burden of proving such intent.

b. Shifting the burden of disproving such criminal intent to the defendant.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Federal Constitution and Article I, Section 3, of the Constitution of the State of Washington, the latter of which reads as follows: "PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property without due process of law."

STATUTORY PROVISIONS INVOLVED

The Revised Code of Washington 10.58.02 which reads as follows:

> "Presumption of innocence — Conviction of lowest degree, when. Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been

proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest."

R.C.W. 9.48.030 Murder — First degree — Death Penalty up to jury. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either —

(1) With a premeditated design to effect the death of the person killed, or of another; or,

(2) By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or,

(3) Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; or,

(4) By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death; and in every trial for murder in the first degree, the jury shall, if it find the defendant guilty, also find a special verdict as to whether or not the death penalty shall be inflicted; and if such special verdict is in the affirmative, the penalty shall be death, otherwise, it shall be as herein provided. All executions in accordance herewith shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent therof.

R.C.W. 9.48.040 Murder in the scond degree. The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when —

(1) Committed with a design to effect the death of the person killed or of another, but without premeditation; or

(2) When perpetrated by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of a felony other than those enumerated in RCW 9.48.030.

Murder in the second degree shall be punished by impris-

onment in the state penitentiary for not less than ten years.

R.C.W. 9.48.060 Manslaughter. In any case other than those specified in RCW 9.48.030, 9.48.040 and 9.48.050, homicide, not being excusable or justifiable, is manslaughter.

Manslaughter is punishable by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment.

STATEMENT OF THE CASE

Petitioner was charged by information with the crime of first degree murder (R. 6). To this charge two pleas were entered, one of "not guilty" (R. 6), and a special plea of not guilty which alleged tha petitioner was mentally irresponsible at the time of the commission of the act, that he had subsequently recovered therefrom, and that he was mentally responsible at time of trial (R. 6, 7).

Petitioner in open court admitted that he shot the decedent. The other aspects of the case such as wilfully, intentionally, feloniously, and with premeditated malice, were denied by petitioner (R. 7). On May 24, 1963, the jury brought in a verdict of "Guilty of Second Degree Murder". The petitioner was sentenced to life imprisonment on June 11, 1963 (R. 1225).

REASONS FOR GRANTING WRIT

The Supreme Court of the United States has not delineated the criminal jury instructions which can be given in favor of a State without violating the Fourteenth Amend-

ment and without, at the same time, emasculating a defendant's presumption of innocence.

A lack of uniformity among the fifty states creates a serious problem in the administration of criminal justice. Approximately 15 of the 50 states, including Washington, by statute or judicial holding presume that once a killing has been established the act is second degree murder. 3 *Underhill Criminal Evidence,* 5th Edition, 1591.

Petitioner submits that it is patently unfair and violates due process to make geography a factor in a homicide case. Due process knows no geographic limits. A defendant's personal rights and liberties should not be affected by the place of he homicide.

The decision rendered in *Morrissette v. U.S.,* 342 U.S. 246 (1952), needs to be clarified and particularized because lower courts are inconsistent in applying this case.

Restrictive Interpretations

Razete v. U.S., 199 F. 2d 44, (6th Cir. 1952)

St. Johnsbury Trucking Company, Inc. v. U.S., 220 F. 2d 393, (1st Cir. 1955)

U.S. v. Hart Motor Express, Inc., 160 F. Supp. 886, (D. C. Minn. 1958)

Liberal Interpretations

Gordon v. U.S., 203 F. 2d 248, (10th Cir. 1953)

Rent et al v. U.S., 209 F. 2d 893, (5th Cir. 1954)

U.S. v. Nedley, 255 F. 2d 350, (3d Cir. 1958)

Mullen v. U.S., 263 F. 2d 275, (D. C. Cir. 1958)

Levine v. U.S., 261 F. 2d 747, (D. C. Cir. 1958)

ORIGIN AND FALLACIES OF SECOND DEGREE MURDER PRESUMPTION IN THE STATE OF WASHINGTON

In 1895 the scales of justice were first tipped in favor of the State of Washington against defendants in the case of *State v. Payne,* 10 Wash. 545 at 553, 39 Pac. 157 (1895) as follows:

> "Every one is presumed to intend the natural and necessary results of his actions. If he kills another he must, in the absence of a showing to the contrary, be presumed to have intended to kill him. And while it is true that even although he did intend to kill he may not be guilty of murder, or of any other crime, yet if he is not, it is by reason of some fact in justification of his action, the burden of proving which public policy demands should be cast upon him. If it is held that the fact of killing does not raise the presumption that it was malicious, the administration of criminal justice will be greatly interfered with. It is therefore the duty of courts to hold otherwise, if due care for the rights of the defendant will allow. *Without such presumption to aid the prosecution it might happen that two persons would be alone in a room, and one kill the other, without any justification whatever, and yet the presecution be utterly unable to secure his conviction, for the reason that there was nothing to show the circumstances surrounding the killing."* (Emphasis added)

The *Payne case, supra,* was relied upon to uphold petitioner's conviction. His challenge to these presumptions is not met by the court's statement which ignored the constitutional issues tendered: "All instructions having been repeatedly approved by this court, we find their employment to be without error in the trial of the cause" (Appendix A, page 27). This is a classic example of the sanctification of ancient fallacy without analysis.

The fallacies of this Washington case and the instructions evolved therefrom rest upon the fact that people can and do fire guns at others without any intent, i.e. accidental firing, or without legal intent because of mental irresponsibility. A gun may also be fired with various intents: To scare, to maim, or in the act of self-defense.

The theory of the *Payne* case, supra, can not be supported as an application of the United States Supreme Court's approval of the use of certain presumptions in the "public welfare offenses" field, i.e. narcotics. Technically speaking, there is no "public welfare" involved in the crime of murder.

The Washington Supreme Court's adherence to the use of the second degree murder presumption in criminal cases is in marked contrast with its approach in the civil field where it has held that it is improper to instruct on due care or *res ipso loquitur.* (Appendix H, page 41).

Also in the civil field the same court has held that pre-

sumptions are not evidence, they can be overcome by evidence, and when evidence is offered they drop from the case (Appendix H, page 41). Why should presumption instructions be eliminated in the civil field but continued in criminal law? In the American tradition human rights are valued above money and property rights.

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS

This court has stated that fair play is the essence of due process. *Galvan v. Press,* 347 U.S. 522 (1954). It is manifestly unfair to give presumption instructions which are legally irreconcilable, i.e. innocence, guilt of second degree murder and intent of natural and probable consequences of acts. The combination of these instructions is also confusing to a lay jury.

"The law will not countenance any presumptions which by overcoming the presumption of innocence will cast the burden of proving his innocence upon the defendant." 3 *Underill's Criminal Evidence,* Fifth Edition, Section 43, p. 66. The presumption of second degree murder instruction used against petitioner shifted the burden of proof upon him and therefore violates the concept that due process forbids the placing of any burden of proof upon defendant. *Davis v. U.S.,* 160 U.S. 469, at page 505 (1895). *Speiser v. Randall,* 357 U.S. 513 (1958).

There must be a direct and logical connection between presumed fact and established fact based upon normal human experience. *Manning v. Mutual Life Insurance Co.*, S.C. 10 Otto 693, 699, (1880). *Greer v. U.S.*, 245 U.S. 559 (1918). The established fact that a killing has taken place does not warrant the conclusion that such killing was with intent. If there is no rational connection between facts presumed and facts proved then such presumption violates the due process clause of the Fourteenth Amendment. *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79 (1916). *Manley v. State of Georgia*, 279 U.S. 1 (1928).

Petitioner's constitutional rights were further violated by the combination of the intended consequence instructions and the second degree murder instruction so as to convert a crime requiring the proof of specific intent into one of absolute liability, thereby relieving the State of its burden of proof in violation of *Smith v. California*, 361 U.S. 147 (1959) and *Lambert v. California*, 355 U.S. 225 (1957). Assuming the defendant produces no evidence whatsoever and the jury follows these instructions, every killing in the State of Washington is second degree murder. All the State must prove is that the defendant did the act because the presumptions are treated as evidence and supply the specific statutory intent.

CONCLUSION

In conclusion, on the facts and law, we respectfully urge this court to grant this Petition for the reason that this petitioner was deprived of his liberty without due process of law under the Fourteenth Amendment to the United States Constitution. It is believed that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

JOHN GAVIN
Counsel for Petitioner Mays.

LEO C. KENDRICK
of Counsel for Petitioner Mays.

APPENDIX A

[No. 37130. En Banc. October 8, 1964.]

THE STATE OF WASHINGTON, *Respondent*, v. MICHAEL C. MAYS, *Appellant*.*

[1] **Criminal Law — Trial — Continuance — Admission of Evidence.** The denying or admitting of evidence in rebuttal, as well as the granting or denying of a recess, postponement, or continuance, rests within the discretion of the trial court, and can be disturbed only for an abuse of this discretion; and there was no abuse of discretion in denying a postponement during trial so as to relocate for rebuttal a psychiatrist who had previously testified, where ample time existed prior to the postponement motion to locate him, where the witness would have been used for impeachment rather than substantive purposes, and where any other expert in the field of psychiatry could have been used.

[2] **Same — Evidence — Mental Irresponsibility — Impeachment.** While the defendant is allowed wide latitude in sustaining his burden of proving, by a preponderance of the evidence, mental irresponsibility, the state is granted similar latitude in replying to this proof, since if the acts described do not indicate insanity they may well show sanity; and where such proof by the state also tends to impeach the defendant without a proper foundation being laid, this does not supply sufficient grounds for its exclusion.

[3] **Same — Trial — Arguments of Counsel — Comment on Evidence.** A prosecuting attorney may make reasonable inferences and deductions from the facts in giving his summation of the evidence to the jury, and where such remarks are based upon the evidence, they are within the realm of fair comment.

[4] **Same — Homicide — Applicable Law — Instructions.** In a prosecution for first-degree murder, the trial court properly stated the law of this jurisdiction by instructing the jury that a person is held to have intended the usual and ordinary consequences of his acts; that a felonious killing is presumed to be second-degree murder with the burden on the

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* Reported in 395 Pac. 2d 758.

state to raise it to first degree by proof beyond a reasonable doubt; that second degree murder is an offense lesser in nature but included in the crime of first degree and requiring proof beyond a reasonable doubt on each element; and, where mental irresponsibility was pleaded in defense, by an instruction reflecting this state's adherence to the M'Naghten rule.

[5] **Same—Presumptions Aiding State—Presumption of Innocence.** A felonious homicide is presumed to constitute murdur in the second degree, and such presumption does not create a presumption as to a fact which the defendant must rebut or impair the presumption of innocence attaching to the defendant's presumption of innocence infringed upon by a presumption that every man is presumed to be mentally responsible until the contrary is shown by a preponderance of the evidence, where mental irresponsibility is pleaded as a defense.

Appeal from a judgment of the Superior Court for Yakima County, No. 12830, Ralph Armstrong, J., entered June 11, 1963. *Affirmed.*

Prosecution for murder in the first degree. Defendant appeals from a conviction and sentence entered on a verdict of murder in the second degree.

Gavin, Robinson, Kendrick & Redman, for appellant.

Lincoln E. Shropshire, Wiley G. Hurst, and *Walter B. Dauber,* for respondent.

HALE J.—In the early hours of a wintry morning in downtown Yakima, Michael C. Mays fired three shots from a .38 caliber revolver into his former wife, Denise A. Mays, inflicting four wounds. She died from these wounds nearly 4 hours later, at about 5 a.m., February 2, 1963, in the

hospital. Several years of marital discord followed by a divorce, months of bitter recrimination over the care and custody of Debbie, their minor daughter, and surveillance by the defendant of his former wife's comings and goings, all preceded the shooting. A few moments before the fatal fusillade, the defendant, Michael C. Mays, had accosted his wife and her escort as they were about to walk to a parked automobile. A minute or so after a brief but animated conversation, and as he stood only a few feet from her, defendant drew the revolver from his pocket and fired the deadly rounds.

No element of mystery cloaks the doing of the acts from which Denise Mays died; no doubt exists that Michael C. Mays held the gun that killed Denise Mays or that he fled from the scene of the killing in an automobile at high speed to his home where he made a telephone call just before the police arrived there; no one denied that the revolver was found under his bed. Testimony of a close-by eyewitness, coupled with the victim's dying declaration, added to a wealth of demonstrative evidence and the defendant's admission, establish beyond any doubt that the defendant committed the acts wherefrom Denise Mays died.

To the information charging murder in the first degree, appellant entered two pleas: Not guilty and not guilty by reason of mental irresponsibility, each of which was fully

covered in the court's charge to the jury. From a judgment and sentence of life imprisonment entered on a verdict of murder in the second degree, and following denial of his motions for arrest of judgment or in the alternative for a new trial, appellant brings this appeal on five separate assignments of error:

"1. The Court erred in refusing appellant permission to recall Dr. Hood as a rebuttal witness.

"2. The court erred in permitting the prosecutor to call Phyllis C. Barnhart as a rebuttal witness.

"3. Misconduct of prosecuting attorney in his final argument which could not be cured at the time.

"4. The court erred by improperly commenting on the evidence.

"5. The court erred in instructing the jury upon the following presumptions: of second degree murder; that the defendant intended natural and probable consequences of his acts; and the presumption of mental responsibility."

Appellant describes his first assignment of error as a refusal to allow him to recall Dr. Hood, a psychiatrist, in rebuttal. We would not denominate the court's action as a refusal to hear the witness; rather, we note from the record that the trial court declined to grant a continuance or allow a substantial interruption in the trial while appellant searched for and returned Dr. Hood to the stand. The wit-

ness, a specialist in psychiatry, when earlier called by the appellant, testified at length as to appellant's personality, described appellant's responses to psychological testing, and explained his observations derived from psychiatric examinations. He related appellant's personal history and gave his opinion as to appellant's emotional and mental condition.

In rebuttal, the state called Dr. Berg, likewise a psychiatrist, who based his opinion neither on a personal examination nor on testing of the appellant, but relied exclusively upon his observations of the appellant's demeanor, conduct and testimony during the trial, and the testimony given by Dr. Hood--including a detailed hypothetical question put to Dr. Hood by Mr. Gavin, appellant's counsel. Dr. Berg told the jury that, in his opinion, appellant had no disease of the mind nor was he laboring under such a defect of reasoning as to not know the nature of the act he was doing; and that appellant did know the difference between right and wrong. In his opinion, appellant had no symptom of brain damage. Dr. Berg completed this rebuttal testimony on direct examination shortly before court recessed for the day, Wednesday, May 22, 1963. Early in the afternoon of the next day, Thursday, May 23rd, appellant requested the court to grant a postponement to enable him to recall Dr. Hood. He offered to prove that Dr. Hood would give an opinion that Dr. Berg could not conclusively rule out brain damage or mental disease in ap-

pellant merely from observing appellant in the courtroom, hearing the questions and listening to the testimony.

[1] We see many reasons why the trial court properly refused the recess or postponement to allow time to locate Dr. Hood. First, the granting or denial of a continuance, a recess, or a postponement rests in the sound discretion of the trial court, and error cannot be predicated thereon unless the trial court clearly abuses its discretion. Second, appellant had ample time to arrange for Dr. Hood's return to the witness stand between the Wednesday afternoon adjournment when Dr. Berg had completed his direct examination and appellant's offer of proof made the following afternoon. Third, the offer of proof promised no substantive evidence in reply to Dr. Berg's opinion, but rather evidence of an impeaching nature—evidence tending to impeach Dr. Berg's ability to form sound medical conclusions. Fourth, appellant was not limited to Dr. Hood for his purpose. Any qualified expert in the field of psychiatry could have been called by appellant for this purpose on surrebuttal. We find no error in the trial court's refusal to postpone or interrupt the trial to allow further time for appellant to find and return Dr. Hood to the courtroom. Denying or admitting evidence in rebuttal—or, as in this case, surrebuttal—rests largely within the discretion of the trial court. *Roche Fruit Co. v. Northern Pac. R. Co.*, 184 Wash. 695, 52 P. (2d) 325; *Kelly v. Department of Labor & Industries*, 172 Wash. 525, 20 P. (2d) 1105. This

same discretion lies with the trial court when it comes to granting or denying a recess, postponement or continuance. In either instance, abuse of discretion must necessarily be shown as a prelude to disturbing the trial court's order. *State v. Williford,* 64 Wash. Dec. (2d) 802, 394 P. (2d) 371; *State v. Thompson,* 59 Wn. (2d) 837, 370 P. (2d) 964; *State v. Smith,* 56 Wn. (2d) 368, 353 P. (2d) 155; *State v. Hartwig,* 36 Wn. (2d) 593, 219 P. (2d) 564; *State v. Comer,* 176 Wash. 257, 28 P. (2d) 1027.

Appellant directs his second assignment of error to other rebuttal evidence offered by the state. On direct examination, appellant testified that he had never threatened to kill Denise Mays. Appellant also submitted extensive evidence as to his mental and emotional condition covering a period of years before the shooting. As a part of its case in rebuttal, the state called Phylis C. Barnhart who, describing a conversation with appellant, testified, over strenuous objection, that in either July or August, 1961, "He said that he would never let another man have Denise, and before he would ever let another man be a father to Debbie he would drive them, all three, over a cliff."

[2] We agree with appellant that, if this testimony were offered solely to impeach appellant's statement that he had never threatened his former wife, the objection was well taken that no proper foundation for such impeachment had been laid. Time-honored rules of evidence would have

required the state to ask—as a proper predicate to impeachment—whether he had ever made such statements to Mrs. Barnhart and to fix the time, place and circumstances thereof as nearly as possible. Only in case of a denial would exclusively impeaching testimony be allowed. But here the impeachment seems merely incidental to the main purpose—incidental to proof of the appellant's mental condition during a relevant period before the acts charged and made relevant by the comprehensive evidence submitted by appellant concerning his life history.

Insanity and mental irresponsibility are in essence affirmative defenses which, when interposed as pleas to a criminal charge, place the burden of proof by a preponderance of the evidence upon the defendant. He has wide latitude in proving mental irresponsibility and may show his conduct, acts, and condition before and for a relevant period after the event charged. But the rule which allows this latitude to the accused grants similar latitude to the state in reply, for if the acts described do not indicate insanity, they may well show sanity. 2 Wigmore on Evidence (3d ed.) § 228; *State v. Collins*, 50 Wn. (2d) 740, 314 P. (2d) 360; *State v. Odell*, 33 Wn. (2d) 4, 227 P. (2d) 710. The trial court properly allowed evidence of threats against the deceased on rebuttal in answer to appellant's proof of mental irresponsibility; that this evidence also tended to impeach the appellant's earlier testimony does not supply

grounds for its exclusion. The second assignment of error, we conclude, points to no error in the trial.

[3] As to the third assignment of error, we find ample evidence in the record to support respondent's argument to the jury concerning the interval between the shots and the position of Denise Mays' body when one or more of the shots took effect. One may make reasonable inferences and deductions from the facts in giving his summation of the evidence to the jury. The remarks of the prosecuting attorney, based as they were upon the evidence, were within the realm of fair comment and, hence, not error. *State v. Griffith*, 52 Wn. (2d) 721, 328 P. (2d) 397; *State v. Stratton*, 170 Wash. 666, 17 P. (2d) 621; *State v. Stone*, 169 Wash. 233, 13 P. (2d) 427.

In his fourth and fifth assignments of error, appellant makes a searching study and analysis of several instructions. He directs the assignments to instruction 15, an instruction which says that one is held to intend the ordinary and usual consequences of his acts;[1] instruction 10,

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[1] "The law presumes that every sane or mentally responsible person intends the natural, ordinary, and usual consequences of his own voluntary and intentional acts, and if the defendant is shown by the evidence beyond a reasonable doubt to have killed the deceased by an act, the natural and ordinary consequence of which would be to produce death, then it will be presumed that the death of the deceased was intended by the defendant unless the facts and circumstances of the killing, or the evidence, creates a reasonable doubt whether the killing was done purposely.

relating to the presumption that a felonious killing is second-degree murder with the burden on the state to raise it to first degree by proof beyond a reasonable doubt;[2] instruction No. 8, covering the problem of a lesser included offense and defining the elements of murder in the second degree;[3] instruction 19, on the presumption of sanity;[4] and

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"On the other hand, proof or admission of the fact of killing, alone, does not raise any presumption of that premeditation or deliberation which is required to be proven beyond reasonable doubt in connection with a charge of first degree murder." Instruction 15.

[2] "When the felonious killing of a human being by another is proven beyond a reasonable doubt, the law presumes that such killing constitutes murder in the second degree. The burden is upon the state to raise the charge to murder in the first degree by proof beyond a reasonable doubt. The defendant bears the burden of justifying his act or reducing the charge to manslaughter by proof by a preponderance of the evidence." Instruction 10.

[3] "Included within the crime alleged in the Information is the lesser offense of Murder in the Second Degree. If you find the defendant is not guilty of the Crime of Murder in the First Degree as alleged in the Information, you must then determine whether he is guilty of Murder in the Second Degree.

"To convict the defendant of the crime of Murder in the Second Degree, you must be convinced by legal and competent evidence beyond a reasonable doubt that:

"(1) That Denise Ann Mays was shot and killed on or about the 2nd day of February, 1963;

"(2) That she was shot and killed in Yakima County, Washington;

"(3) That the shooting was done wilfully, intentionally, feloniously and with malice by Michael C. Mays.

"(4) That the killing was committed with a design by the defendant to effect the death of the person killed but without premeditation." Instruction 8.

[4] "Every man is presumed to be mentally responsible and to

instruction No. 22, which defines and prescribes the burden of proof as to mental irresponsibility.[5] Appellant contends that these five instructions constitute a comment upon the evidence by asserting a fact through declaring a presumption (instructions 15 and 19), inferring the fact of second-degree murder (instructions 10 and 8), and, if we understand the claimed error in instruction 22, that it too constitutes a gratuitous comment upon the evidence to the effect that, even though sick in mind and body, the defendant could be held responsible for the crime.

The fourth and fifth assignments of error, overlapping each other in some degree, will be regarded in pari materia and discussed together. In doing so, we should make it

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intend the natural and usual consequences of his own acts. As the law presumes a man to be mentally responsible until the contrary is shown, I instruct you that the burden of proof of mental irresponsibility as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, as that term is defined in these instructions, and unless mental irresponsibility is established by a fair preponderence of the evidence, the presumption of mental responsibility must prevail." Instruction 19.

[5] "You are instructed that is is not enough that the Defendant show merely that he was mentally unbalanced at the time of the commission of the offense charged, but he must prove by a preponderance of the evidence that he was laboring under such a defect of reason which would constitute mental irresponsibility as defined in the prior instruction.

"A person may be sick in mind or body and yet be mentally responsible as defined in the prior instruction.

"A frenzy arising solely from the passion of anger or jealousy which does not meet the test of mental irresponsibility as defined by the court will not excuse the crime charged, on the basis of mental irresponsibility." Instruction 22.

clear that no case from this jurisdiction has been brought to our attention which rejects or casts serious doubt upon the propriety of any of the instructions here under attack. In none of the cases cited to support appellant's claim of error do we find these particular instructions in issue or even a peripheral suggestion that these insructions are suspect. Rather, it seems that appellant would have us take a new look at these instructions and regard them de novo as thought they were offered in a murder trial for the first time.

[4] No rule, precept, doctrine or concept of law is so firmly established, or comes from so eminent an authority, that it shall be deemed forever free from re-examination, analysis and challenge. Unlike the Decalogue, neither common law nor statute is said to be carved in granite, and the courts may study anew any rule or principle from time to time no matter how time honored it may be. But the constant reapplication of a rule and its repeated employment strongly suggests that it has been so re-examined and studied, and each time found suitable by a tribunal which itself is subject to inevitable change through the passing of time. Thus, when the court in *State v. Collins*, 50 Wn. (2d) 740, 314 P. (2d) 660, approved an instruction practically identical to instruction 15 here, it did so knowing that our legal system depends upon the idea of personal responsibility, and that the law must hold a person to have intended the usual and ordinary consequences of

his acts. Our re-examination of instruction No. 15 makes us conclude again that it was not error to give it.

We make the same observation as to instruction No. 10, finding it to have been re-examined and approved by us in *State v. Moore,* 61 Wn. (2d) 165, 377 P. (2d) 456. Nor can we find error in instruction No. 8, in which the trial court defined murder in the second degree by breaking it into its component elements, and showing it to be an offense lesser in nature but included in the crime of first degree and requiring proof beyond a reasonable doubt on each element. We cannot see how, when instruction No. 10 is read with all of the other instructions given, it can be said to be a comment on the evidence or leave an inference with the jury that the trial court believed the defendant guilty of second-degree murder.

Instruction 22, as challenged by the appellant, simply reflects this court's adherence to the M'Naghten rule where insanity or mental irresponsibility are pleaded in defense, and we do not regard it as error. *In re White v. Rhay,* 64 Wash. Dec. (2d) 14, 390 P. (2d) 535; *State v. Collins, supra.*

Our final observations have to do with the points raised by appellant's fifth assignment of error which go specifically to the use of the word *presumption,* or words of the same import, as in instruction 10 where it is said that "When the felonious killing of a human being by another

is proven beyond a reasonable doubt, the law *presumes* that such killing constitutes murder in the second degree . . . "; and in instruction No. 15 that "the law *presumes* that every sane person . . . intends the natural, ordinary, and usual consequences of his . . . intentional acts," and, again, as in instruction 19, that "Every man is *presumed* to be mentally responsible and to intend the natural and usual consequences of his own acts." (Italics ours.) Appellant says that this language creates legal presumptions as to facts which the defendant must produce evidence to rebut, and shifts burdens upon one accused of crime that he ought not be obliged to bear under our law. The only presumption validly presented in a criminal case, says appellant, is the presumption of innocence, which loses its force when given in connection with the instructions herein referred to.

[5] We do not see how any of the instructions alluded to create any presumption of facts that impairs, curtails or infringes the presumption of innocence. The presumption that a felonious homicide shall be deemed murder in the second degree and placing the burden on the state to raise it to first degree and on the defendant to lower it to manslaughter has been the rule in this jurisdiction, continuously and without serious question, since *State v. Payne*, 10 Wash. 545, 39 Pac. 157 (1895), and affirmed in an unbroken line of precedents, including *State v. Thomas*,

63 Wn. (2d) 59, 385 P. (2d) 532; *State v. Moore,* 61 Wn. (2d) 165, 377 P. (2d) 456; *State v. Turpin,* 158 Wash. 103, 290 Pac. 824; *State v. Gruber,* 150 Wash. 66, 272 Pac. 89; *State v. Cook,* 126 Wash. 81, 217 Pac. 42; *State v. Duncan,* 101 Wash. 542, 172 Pac. 915; *State v. Totten,* 67 Wash. 192, 121 Pac. 70; *State v. Clark,* 58 Wash. 128, 107 Pac. 1047; *State v. Melvern,* 32 Wash. 7, 72 Pac. 489. This leaves for final comment instructions 15 and 19.

When we say that the law *presumes* that every sane person intends the natural, ordinary and usual consequences of his acts, as set forth in instruction 15, it is but another way of asserting that the law so deems it; and it is one way of declaring the rule of personal responsibility by which all members of a civilized society must be bound. The same reason supports instruction 19 in which it is said that every man is *presumed* to be mentally responsible or sane until the contrary is shown by a preponderance of the evidence. Here, too, the use of the word *presumed* is simply one way of saying that one is deemed or held in law to be sane until by a preponderance of the evidence mental irresponsibility is shown. Neither instruction, when considered in pari materia with the court's whole charge to the jury, in any way trespasses upon, curtails or impairs the presumption of innocence nor, as we see it, does either instruction assert a fact requiring evidence to overcome. Both instructions declare the principles of law approriate to the issues

raised by the information and the pleas of not guilty and not guilty by reason of mental irresponsibility. That this court has upheld instructions such as 15 and 19 in trials involving charges of murder in the first or second degree and in other types of crimes is seen in *State v. Collins, supra; State v. Myers,* 53 Wn. (2d) 446, 334 P. (2d) 536; *State v. Putzell,* 40 Wn. (2d) 174, 442 P. (2d) 180; *State v. Hartley,* 25 Wn. (2d) 211, 170 P. (2d) 333; *State v. Schafer,* 156 Wash. 240, 286 Pac. 833; *State v. Harris,* 74 Wash. 60, 132 Pac. 735; and *State v. Clark,* 34 Wash. 485, 76 Pac. 98.

All instructions having been repeatedly approved by this court, we find their employment to be without error in the trial of the cause.

Judgment affirmed.

OTT, C. J., HILL, FINLEY, WEAVER, ROSELLINI, HUNTER, and HAMILTON, JJ., and CUSHING, J. Pro Tem., concur.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*,

vs.

MICHAEL C. MAYS, *Appellant*.

No. 37130

ORDER DENYING PETITION FOR REHEARING

The Court having considered the appellant's petition for a rehearing herein and a majority of the Judges being of the opinion that it should be denied, it is ordered that the petition be and it is hereby denied.

Dated this 5th day of January, 1965.

By the Court:

/s/ RICHARD B. OTT

RICHARD B. OTT, *Chief Justice*

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964.

MICHAEL C. MAYS, *Petitioner,*

vs.

STATE OF WASHINGTON

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner, and counsel for the respondent having indicated that he has no objection thereto,

IT IS ORDERED that the execution and enforcement of the judgment of the Superior Court of Yakima County, State of Washington, be, and the same is hereby, stayed providing a petition for writ of certiorari is filed in this Court on or before February 4, 1965. Should such petition be so filed, this stay is to continue pending action upon such petition.

In the event the petition for writ of certiorari is denied, this stay will terminate automatically. Should the petition for writ of certiorari be granted, this stay is to continue pending the issuance of the mandate of this Court.

This stay is conditioned upon the posting of a good and sufficient bail bond in the sum of Fifty Thousand ($50,000) Dollars, said bond to be posted with and approved by the Superior Court of Yakima County, State of Washington, or a judge thereof, and when so posted and approved to be filed with the Clerk of that court.

/S/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States.

Dated this 7th day of January, 1965.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY.

STATE OF WASHINGTON, *Plaintiff*,

vs.

MICHAEL C. MAYS, *Defendant*.

No. 12803

ORDER CONTINUING BOND ON APPEAL

The above matter having duly and regularly come on before the above entitled court seeking the entry of an order extending bond on appeal heretofore filed herein and it appearing to the court that both of the sureties securing the bondsmen herein have consented to such an extension, and the court being fully advised in the premises, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the bond now on file herein be and the same is hereby extended so as to remain in full force and effect until

(1) Michael C. Mays fails to file his petition for Writ of Certiorari within the time heretofore granted by an Associate Justice of the United States Supreme Court, or,

(2) If he files same then until the Writ of Certiorari be denied, or

(3) If the Writ of Certiorari be granted, then said bond shall remain in full force and effect until the cause shall have been determined by the Supreme Court of the United States, but in no event longer than one year from the date of the granting of said Writ of Certiorari even though the matter on appeal shall not have been concluded by the end of said year.

Upon the occurrence of any one of the three foregoing events, but not before the State of Washington and the sureties on said bond shall have available to them all rights under said bond, and or indemnity agreements, securities agreements, promissory note and mortgage.

DONE IN OPEN COURT this 25th day of January, 1965.

/s/ RAY E. MUNSON, *Judge*

PRESENTED BY:

LEO C. KENDRICK
Attorney for Defendant

APPROVED:

William Allen Leonard and Lorene Mays Leonard,
husband and wife,

By LEO C. KENDRICK

Theo H. Mays

By LEO C. KENDRICK

APPROVED AS TO FORM:

J. P. TONKOFF

Attorneys for Hobert B. Bowlby and Maude Bowlby, husband and wife.

APPENDIX E

COURT'S INSTRUCTIONS
PRESUMPTION OF INNOCENCE

INSTRUCTION No. 3

To this information the defendant has interposed the plea of not guilty, which casts upon the state the burden of proving every material element, hereinafter defined, of the crime charged, beyond a reasonable doubt.

The law presumes that every person who is accused of a crime is innocent of the commission of said crime. This presumption is not a mere matter of form, which the jury may disregard, but is a substantial part of the law of the land is binding upon the court and the jury and accompanies and remains with the defendant throughout all the stages of the trial, including the deliberations of the jury, and the defendant cannot be convicted until the jury is satisfied beyond a reasonable doubt that this presumption of innocence has been overcome by the evidence and that the defendant is guilty of said crime.

OBJECTIONABLE INSTRUCTIONS
PRESUMPTION OF SECOND DEGREE MURDER

INSTRUCTION No. 10

When the felonious killing of a human being by another is proven beyond a reasonable doubt, the law pre-

sumes that such killing constitutes murder in the second degree. The burden is upon the state to raise the charge to murder in the first degree by proof beyond a reasonable doubt. The defendant bears the burden of justifying his act or reducing the charge to manslaughter by proof by a preponderance of the evidence.

PRESUMPTION OF INTENDED CONSEQUENCES

INSTRUCTION No. 15

The law presumes that every sane or mentally responsible person intends the natural, ordinary, and usual consequences of his own voluntary and intentional acts, and if the defendant is shown by the evidence beyond a reasonable doubt to have killed the deceased by an act, the natural and ordinary consequence of which would be to produce death, then it will be presumed that the death of the deceased was intended by the defendant unless the facts and circumstances of the killing, or the evidence, creates a reasonable doubt whether the killing was done purposely.

On the other hand, proof or admission of the fact of killing, alone, does not raise any presumption of that premeditation or deliberation which is required to be proven beyond reasonable doubt in connection with a charge of first degree murder.

PRESUMPTION OF MENTAL RESPONSIBILITY AND INTENDED CONSEQUENCES

INSTRUCTION No. 19

Every man is presumed to be mentally responsible and to intend the natural and usual consequences of his own acts. As the law presumes a man to be mentally responsible until the contrary is shown, I instruct you that the burden of proof of mental irresponsibility as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, as that term is defined in these instructions, and unless mental irresponsibility is established by a fair preponderance of the evidence, the presumption of mental responsibility must prevail.

APPENDIX F

"Defendant appellant also takes the position that to give these presumption instructions violates R.C.W. 10.58.020, Article I, Section 3, Article IV, Section 16, of the State Constitution, and the requirements of due process under the 14th Amendment to the U. S. Constitution."

Excerpt from pages 26 and 27, Michael C. Mays, Appellant's Brief on Appeal to Supreme Court of State of Washington.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*,

vs.

MICHAEL C. MAYS, *Appellant*.

No. 37130

STATEMENT OF ADDITIONAL AUTHORITIES

Appellant respectfully submits to the court additional authorities in support of its assignment of error number five, in which it is urged that it is error for the court to instruct upon presumptions in a criminal case, as follows: *State v. Person*, 56 Wn. 2d 283; *State of Minn. v. Morris Nathaniel Keaton*, 104 N.W. 2d, 650; *Joseph Edward Morissette v. United States of America*, 342 U.S. 246; 96 L. Ed. 288.

For the convenience of counsel and the court, appellant attaches hereto copies of the decisions in the Minesota and Supreme Court cases.

In the case of *State v. Person, supra*, the court is confronted with a *prima facie* presumption of guilt set forth in R.C.W. 77.16.050, which makes possession of a gun under certain circumstances *prima facie* evidence of guilt.

At page 287 of this opinion, the court takes the position urged by appellant in his brief, namely, that the entry of facts into the record which constitute a *prima facie* case under the statute require the case to be submitted to the jury. Further, the court in this opinion states that any instruction given upon his statutory presumption should make abundantly clear to the jury that such presumption permits but in no way directs the jury to convict the accused, and must be considered in the light of the presumption of innocence.

In the Minnesota case, *State v. Keaton, supra,* the Minnesota Supreme Court, at pages 654, 655 and 656, discusses the propriety of giving presumption instructions, such as were given in this case, and concludes that there is:

> " . . . no rational basis for distinguishing between criminal and civil cases, insofar as the propriety of giving instructions on presumptions is concerned." Page 655 of the cited opinion.

The United States Supreme Court case, hereinabove referred to, categorically holds at pages 306 and 307 thereof that instructing on presumptions in a criminal case constitutes error sufficient to warrant a reversal of the conviction in that case. The United States Supreme Court at page 306 sums up appellant's position quite well when it states:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could

not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary."

Respectfully submitted,

GAVIN, ROBINSON, KENDRICK & REDMAN
Attorneys for Appellant

Copy served upon respondent, June 20, 1964.

Copies of the opinions referred to in Statement of Additional Authorities omitted from this appendix.

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*,

vs.

MICHAEL C. MAYS, *Appellant*.

No. 37130

PETITION FOR REHEARING

The appellant requests a rehearing in this matter. In doing so the appellant respectfully submits that somehow he has not been able to persuade this court to consider the basic errors which he charges exist of record in this case, errors which have unconstitutionally deprived him of his liberty and have resulted in his being sentenced to life imprisonment.

The appellant sincerely submits that his brief on appeal, his oral argument and the supplemental authorities, which he filed with the court, have for some reason failed to cause this court to come to grips with what he believes are the legal problems which require serious consideration in reaching an ultimate decision in the matter.

The appellant realizes that this court is gravely concerned in any case in which a man's liberty has been taken

from him for the rest of his life, and that this court has always given most careful consideration on appeal to the contentions of those placed in such a position. It is in that spirit that this petition for rehearing is submitted to the court.

The appellant suggests that there are four principal errors in the record which justify the reversal of the trial court. They are as follows:

1. The trial court should not have given the Instructions Number 10, 15 and 19 or any one or any combination of these instructions in any form.

2. These challenged instructions should not have been given in any form because they are inconsistent with and violate the right of appellant to his presumption of innocence.

3. The presumptions reflected in the challenged instructions are founded on a false premise and upon an outmoded policy of the law and should be abandoned.

4. The challenged instructions violate the due process provision of the Fourteenth Amendment to the U. S. Constitution.

In this petition for rehearing, the appellant will deal with the foregoing, all of which fall within appellant's fifth assignment of error set forth in his opening brief. We will not discuss the first four assignments urged in that

brief, not because we are abandoning them, but because we believe that this court should concentrate on the vital four matters listed above.

1.

THE TRIAL COURT SHOULD NOT HAVE GIVEN INSTRUCTIONS NUMBERED 10, 15 AND 19, OR ANY COMBINATION OF THESE INSTRUCTIONS IN ANY FORM. [1]

[1] "When the felonious killing of a human being by another is proven beyond a reasonable doubt, the law presumes that such killing constitutes murder in the second degree. The burden is upon the state to raise the charge to murder in the first degree by proof beyond a reasonable doubt. The defendant bears the burden of justifying his act or reducing the charge to manslaughter by proof by a preponderance of the evidence." Instruction 10.

The law presumes that every sane or mentally responsible person intends the natural, ordinary, and usual consequences of his own voluntary and intentional acts, and if the defendant is shown by the evidence beyond a reasonable doubt to have killed the deceased by an act, the natural and ordinary consequence of which would be to produce death, then it will be presumed that the death of the deceased was intended by the defendant unless the facts and circumstances of the killing, or the evidence, creates a reasonable doubt whether the killing was done purposely.

"On the other hand, proof or admissions of the fact of killing, alone, does not raise any presumption of that premeditation or deliberation which is required to be proven beyond reasonable doubt in connection with a charge of first degree murder." Instruction 15.

"Every man is presumed to be mentally responsible and to intend the natural and usual consequences of his own acts. As the law presumes a man to be mentally responsible until the contrary is shown, I instruct you that the burden of proof of mental irresponsibility as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, as

So it will be quite clear, the appellant contends these instructions and the presumptions they contain *should not have been given to the jury at all.*

The appellant contends that it is improper in a case of this kind to give these presumptions by instructions when the force of the presumptions were spent by countervailing evidence which appellant offered. In line with what is the weight of authority in this jurisdiction in civil actions, and under all principles of basic justice, no mention of the presumptions should have been made to the jury in this case.

The appellant urges that the form in which the instructions may have been given, whether approved in other cases or not, or even if they are academically correct statements of the law, is completely unimportant and irrelevant.

The funtion of any presumption, and these presumptions particularly, is to carry the party entitled to the benefit of the presumption beyond the point to which that party has the burden, not of proof, but of producing evidence. Once the presumption has served that function and once the presumed fact has been placed in issue by any substantial evidence coming from the other party, the pre-

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that term is defined in these instructions, and unless mental irresponsibility is established by a fair preponderance of the evidence, the presumption of mental responsibility must prevail." Instruction 19.

sumption should vanish completely from the case. To tell the jury about the nature and existence of such legal presumptions, as was done here in this case, produces error prejudicial to appellant, and is error which constitutes a deprivation of his constitutional rights.

The appellant was disappointed that the opinion of this court did not deal in any way with the doctrine of *State v. Keaton,* 104 NW (2d) 650, a case decided in 1960 by a respected state appellate court dealing with the very subject about which we are now talking.

This disappointment stems from the fact that the challenged instructions actually have their birth in this jurisdiction as far back as *State v. Payne,* 10 Wash. 545, decided in 1895, some sixty-nine years ago. In the ensuing years this court in civil litigation has vigorously proscribed the use of presumptions in jury instructions in a variety of cases. Considering that the Minnesota court in the *Keaton* case, supra, has followed the same policy of proscribing the use of presumptions in a homicide case such as this, and has done so as recently as 1960, it is felt that this court should give serious consideration to eliminating the use of these presumptions in jury instructions in criminal cases in this jurisdiction.

It seems to the appellant that the language of the Minnesota court in the *Keaton* case, supra, presents logical,

sound and unassailable reasons for eliminating presumptions such as we have challenged. That court said:

> "Apart from the accuracy of the instruction, we would question the propriety, in cases like that before us, of charging the jury with regard to any presumptions on intent. In civil cases we hold that a presumption is merely a procedural device which controls the burden of going forward with the evidence, and hence, disappears whenever substantial countervailing evidence appears from any source. It follows, and we have held, that instructing the jury as to the existence of a presumption gives it an artificial probative effect which is misleading and confusing. The consideration in criminal cases are, of course, somewhat different. Where a defendant in a civil case fails to produce evidence to oppose the presumption operating against him, the court is obliged to direct a verdict for the plaintiff. However, in criminal cases the absence of countervailing evidence cannot result in a directed verdict and consequently the presumption fails to have its intended effect. It may be that under such circumstances some deviation from the rule in civil cases is required.
>
> In the instant case, however, all of the facts surrounding the homicide were put in evidence by eyewitnesses. The defendant testified that the gun went off accidentally twice in the course of a struggle. Intent and premeditation having thus been put in issue, no legitimate purpose could be served by an instruction on presumptions as to the defendant's intent.
>
> The state argues that the elimination of instructions dealing with presumptions as to intent and premeditation in homicide cases would impose upon the state the often impossible task of proving intent and premeditated design by direct rather than circumstantial evidence. *The fact that premeditation in some cases must be established by inference does not justify in-*

structions on presumptions. As has been pointed out, the jury may be advised as to their right to draw reasonable inferences from all of the facts surrounding the killing. In addition, the court may, in proper cases, mention to the jury by way of comment on the evidence the permissible inference upon which a presumption is based. The giving of a mandatory presumption, however, is of far greater effect and quite distinct from directing the jury's attention to particular inferences which might properly and reasonably be drawn from the evidence. (Emphasis added.)

There are a number of criminal decisions in which this court has approved instructions relating to presumptions, even where all the facts have been adduced and countervailing evidence appeared. However, cases decided prior to *TePoel v. Larson,* 236 Minn. 482, 53 N.W. 2d 468, are of doubtful value and siginficance since the court in that case expressly overruled contrary expressions of opinion in earlier decisions. *State v. Axilrod,* 248 Minn. 204, 79 N.W. 2d 677, relied upon by the state is distinguishable in that the challenged instructions there did not include any reference to "premeditated design" and the case involved an unwitnessed killing.

Other than as previously noted, there is no rational basis for distinguishing between criminal and civil cases in so far as the propriety of giving instructions on presumptions is concerned. Whether the principle prohibiting such instructions should also apply in unwitnessed homicide cases or other situations where countervailing evidence is not adduced must be left for future decision since the question is not now before us. It is apparent, however, that the preferable practice in any case is to limit the instructions to the permissible inferences upon which the presumptions are based."

It is true that the Minnesota court would give in-

structions on the subject matter involved, limiting it, however, to instructions on the permissible inferences which may be made from the facts adduced, *but not telling the jury that a fact is presumed to exist.* Certainly this is a preferable practice to that which was followed in this case. Appellant feels that the instructions *should not be given at all.*

Our court, in a number of decisions, has abandoned the practice of giving certain presumptions to the jury by instruction. It is also most significant that each judge signing the opinion herein has on one or more occasions held that the giving of presumption instructions in either civil or criminal cases is improper. .

Presumption of Due Care:

> Presumption of due care cannot be used as evidence to supply proof of casual connection between negligence of defendant and death of decedent. *Gardner vs. Seymore,* (1947) 27 Wn. 2d 802.
>
> Opinion:
>
> Hill, J.

Reversible Error to Instruct on Due Care of Decedent:

> It is reversible error for a trial court to instruct a jury that the decedent is presumed to be in the exercise of due care. *Hutton vs. Martin,* (1953) 41 Wn. 2d 780.
>
> Opinion:
>
> Donworth, J.

Concurring:

Hill, J.
Finley, J.
Weaver, J.

Presumptions May Be Overcome By Evidence:

It is the rule in this state that a presumption may be overcome by competent testimony from either interested or disinterested witnesses. *In Re Shaner's Estate,* (1952) 41 Wn. 2d 236.

Opinion:

Hamley, J.

Concurring:

Hill, J.
Finley, J.

Instructions May Not Assume As True Facts In Issue:

Instruction which assumes as true the existence or nonexistence of any material fact in issue, in respect to which evidence is conflicting, may never be given to jury. *Ashley vs. Emsley,* 44 Wn. 2d 74 (1954).

Opinion:

Mallery, J.

Concurring:

Hill, J.
Weaver, J.

Presumption Of Due Care:

There is no presumption of due care where there is an issue of contributory negligence. *Mills vs. Pacific County,* (1956) 48 Wn. 2d 211.

Opinion:

Rosellini, J.

Concurring:

Ott, J.
Hill, J.
Weaver, J.

Improper to Instruct on Res Ipsa Loquitur:

It is no longer proper to instruct a jury in the State of Washington on the doctrine of res ipsa loquitur.

Our court stated as follows:

"In cases in which the so-called 'doctrine' is applicable, its primary purpose is to withstand the challenge of the defendant's motion for a non-suit. It did so here. There was no necessity for any instructions." *Chase vs. Beard,* (1959) 55 Wn. 2d 58.

Opinion:

Foster, J.

Concurring:

Weaver, J.
Finley, J.
Rosellini, J.

Presumptions Not Evidences

A presumption is not evidence, therefore its efficacy

is lost when the opposite party adduces prima facie evidence to the contrary. *Bates vs. Bowles White & Company,* 56 Wn. 2d 374.

Opinion:

Weaver, J.

Concurring:

Finley, J.
Donworth, J.
Ott, J.

Error to Limit Instructions to Statutory Presumption of Guilt in Criminal Case:

If there is a statutory presumption of guilt (in this case possession of gun under certain circumstances prima facie evidence of guilt) it is then error to give to the jury an instruction setting forth the statutory presumption unless at the same time another instruction is given making it clear to the jury that the statutory presumption permits but in no wise directs the jury to convict. *State vs. Person,* 56 Wn. 2d 283.

Opinion:

Donworth, J.

Concurring:

Weaver, J.
Hill, J.
Finley, J.
Rosellini, J.
Ott, J.
Hunter, J.

Error to Limit Instruction to Statutory Presumption of Guilt in Criminal Case:

Where the statute made possession of an unlicensed fire arm the prima facie evidence of intent to commit a crime was error to instruct upon the statutory presumption unless there was another instruction that explained to the jury that it was in no wise bound by the prima facie presumption of guilt. *State vs. Thomas*, 58 Wn. 2d 746.

Opinion:

Hill, J.

Concurring:

Finley, J.
Donworth, J.
Weaver, J.
Rosellini, J.

This same doctrine was followed subsequently in the case of *State vs. Thomas*, 63 Wn. 2d 59.

Opinion:

Hunter, J.

Concurring:

Ott, J.
Hill, J.
Hale, J.

Error to Instruct on Res Ipsa Loquitur:

Where a plaintiff introduced evidence which explained the cause of the occurrence causing him injury it was error to instruct the jury on the doctrine of res

ipsa loquitur. *Engen vs. Arnold*, (1963) 61 Wn. 2d 641.

Opinion:

Hamilton, J.

Concurring:

Ott, J.
Donworth, J.
Finley, J.
Hunter, J.

Legal Presumption Against Suicide:

The legal presumption that a person who dies of a gun shot wound dies of an accident rather than a suicide was covered in a recent case.

"In essence the reason that the presumption is not evidence and that, in a case of this kind, it has served its purpose when it gets the plaintiff beyond non-suits. It shifts the duty of going forward with the evidence on the issue of suicide to the defendant and he must prove it by a fair preponderance of the evidence. If Instruction No. 8 (presumption death accident and not suicide), there is no reason to give Instructions Nos. 9 and 10. The combination of the three is like giving a poison (Instruction No. 8) and then rushing in with the antidote (Instructions Nos. 9 and 10). I am willing to admit the efficacy of the antidote in this case, but it is dangerous practice." *Burrier vs. Mutual*, 163 Wn. 2d 266 at page 281.

Concurring Opinion:

Hill, J.

For the reasons advanced above, appellant submits

that not one of the challenged instructions or any combination of them should have been presented to the jury in any form.

It would be well to consider what degrees of homicide are established by statute in this state:

1. If the state proves that one person kills another wihout justification, that is manslaughter;

2. If the state proves that one person kills another *intentionally* without justification, that is second degree murder.

3. If the state proves that one person kills another *intentionally and with premeditation* without justification, that is first degree murder.

It is thus apparent that the one vital, controlling fact that must be proven to support a second degree murder conviction is *intent*. Certainly if intent is the one most vital factor of the crime, it should never, under any circumstances, be presumed. If there is any evidence whatsoever to negative intent, then to indulge in any kind of presumption of intent as a trier of fact (as the jury must do if it is so instructed) is completely inconsistent with and denies to the defendant the presumption of innocence which the law has historically afforded to all criminal defendants.

Here, by these challenged instructions, the jury is

being told that it may presume intent because a "mentally responsible person intends the natural consequences of his acts". We will point out later that such a presumption as indulged in this case is erroneous and based upon a false premise. For purposes of argument on this part of our petition, we wish to point out that there was substantial evidence in the record before this case went to the jury (1) that the defendant was not mentally responsible and (2) that *he did not intend* to kill the decedent. This evidence placed in issue as a fact both the question of whether he was mentally responsible and the question of whether he intended to kill the decedent. As is said in *Bloch vs. United States*, 221 F. 2d 786 at page 788:

> "Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:
>
> > 'The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant.'
>
> That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. *Wardlaw v. U. S.*, 5 Cir., 203 F. 2d 884. However, the trial Court went on in his instruction, and in the very next sentence said:
>
> > 'The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, know-

> ingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.'

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. *Morissette v. U.S.*, 342 U.S. 246, 273, 72 S. Ct. 240, 96 L. Ed. 288; *Wardlaw v. U.S.*, supra. As the Supreme Court said in the *Morissette* case, supra, 342 U.S. at page 275, 72 S. Ct. at page 256:

> 'We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit.' "

If,' in a civil case, the doctrine of *res ipsa loquitur* vanishes and disappears as soon as the fact of negligence is placed in issue by countervailing evidence, why shouldn't the presumption of sanity and the presumption of intent vanish in this case as soon as they are placed in issue by

evidence of mental irresponsibility and evidence of lack of intent? As has been said by this very court:

Presumption of Agency:

> When the presumption is overcome by proper evidence, it ceases to exist and cannot be further considered by the court or jury or used by counsel in argument. *Scarpelli vs. Washington Water Power Company*, (1911) 63 Wash. 18.

Presumption of Fact Not Evidences:

> A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence. *Nicholoson vs. Neary*, (1914) 77 Wash. 294, at 298.

Functions of Presumptions:

> "As I view it, the purpose and effect of a presumption, are, in any event, merely to require the opposite party to come forward with evidence upon the particular issue involved, but the presumption itself is not evidence and should not be weighed as such against actual facts. When the opposite party has been required to assume the burden of coming forward with evidence, the presumption (in this case that of due care) has then not only accomplished its purpose but has also, at the same time, completely spent its force. No part of the presumption being left, it neither possesses nor retains anything of substance in itself to be submitted to the jury.
>
> If the testimony offered by the opposite party be that of interested witnesses, the case, as then made, should go to the jury, but without any reference to the presumption and the jury should then decide the issues

solely upon the evidence before it. *To cast the presumption into the scale as an added element, is to give it weight as evidence and to instruct the jury with reference to presumption is affirmatively to invite the jury to consider it as evidence.* This, in my opinion, is contrary to the function of a presumption and gives it a character to which it is not entitled." *Morris vs. Chicago, M. St. P & P. R. Co.*, 1 Wn. 2d 587 at page 606.

Concurring Opinion:

Steinert, J.

Presumption Drops From Case When Met By Evidence:

When the presumption is overcome by proper evidenec (in this case that of agency) it ceases to exist and cannot be further considered by the court or jury or used by counsel in argument. *Bradley vs. Savage*, (1942) 13 Wn. 2d 28.

"'Presumptions' as happily stated by a scholarly counselor *ore tenus*, in another case, 'may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." *Beeman vs. Puget Sound Traction L & P. Company*, (1914) 79 Wash. 137 at page 139.

If the indulgence in a presumption once its force has been spent, violates the property rights of a man in a civil case, why does its use not violate a man's freedom and right to a fair trial in a criminal case?

2.

THESE CHALLENGED INSTRUCTIONS SHOULD NOT HAVE BEEN GIVEN IN ANY FORM,

BECAUSE THEY ARE INCONSISTENT WITH AND VIOLATE THE RIGHT OF THE APPELLANT TO HIS PRESUMPTION OF INNOCENCE.

As has been pointed out, before the state can validly convict this appellant of second degree murder and cause him to be sentenced to life imprisonment, it must show the killing by the appellant was *intentional.*

If the appellant is to be presumed innocent at all times and throughout all stages of his trial, as the law prescribes, then it must be presumed, if we are dealing with second degree murder, that he did not intend to kill the decedent. Yet, in this case, the doctrine of law that is reflected in the challenged instructions is to the effect that if the killing is shown, there will arise a presumption that it was intentional, and if the defendant is to escape conviction of second degree murder, he must bear the burden of proving lack of intent and thereby lower the degree of crime to manslaughter. One could not conjure a more classic example of inconsistent presumptions. There might be some slight merit in the contention, as advanced in *State vs. Payne*, supra, that the state should be entitled to such a presumption of intent upon the showing or admission (1) that the killing was accomplished by the defendant, and (2) that it was unwitnessed, if in fact and in all human experience, whenever one person shoots a gun at another one, we could say that inevitably it is his intent

to kill that person. The difficulty wih this presumption is that people can and do fire guns at others without necessarily intending to kill them. A gun may be fired with an intent to scare, intent to maim, intent of self-protection, and, more importantly, there may well be no intent to kill at all by reason of mental irresponsibility. As Mr. Justice Homes said in *Greer vs. U. S.*, 245 U.S. 559, 62 L. Ed. 247, at page 472:

> "A presumption upon a matter of fact, when it is not merely a disguise for some other plan, means that common experience shows the fact to be so generally true the courts may notice the truth."

If the presumption is to be engaged in at all, it should centainly only serve the purpose of getting the state past non-suit on a second degree murder charge, and once any evidence of lack of intent comes forward from any witness, interested or otherwise, during the trial, the presumption should promptly and quickly vanish from the case. *In Re Shaner's Estate*, 41 Wn. 2d 236, at page 242:

> "It is the rule in this state, however, that a *presumption may be overcome by competent rebutting testimony from either interested or disinterested witnesses.*" (Emphasis added.)

Certainly the presumption should never show up again in the litigation in the form of an instruction to the jury. If it remains in the case under those circumstances, it becomes completely and totally inconsistent with the presumption of innocence. The jury, approaching the task

of finding facts, should not be told that it is entitled to believe that the defendant, on the one hand, is presumed to have intended to kill the decedent, and, on the other hand, is persumed to be innocent of any intent to kill the decedent. One presumption or the other must prevail. The presumption of innocence must always prevail. Any other presumption that is inconsistent with it must disappear. To take any other course would be to deprive a defendant in a criminal case of the greatest right which we proudly accord to him under our Constitution and under our system of law. In *Perez vs. U. S.*, 5th Cir., 297 F. 2d 12, at page 16:

> "It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other and not mislead the jury . . . most important in no condition of proof is it permissible to leave the jury with the idea that it had become the duty of the defendant to establish his innocence to establish an acquittal."

3.

THE PRESUMPTIONS REFLECTED IN THE CHALLENGED INSTRUCTIONS ARE FOUNDED ON A FALSE PREMISE AND UPON OUTMODED POLICY OF THE LAW AND SHOULD BE ABANDONED.

As pointed out previously, the source of what we now believe to be a fallacy, is *State vs. Payne*, 10 Wash. 545. Appellant was aware and so said in the opening brief and oral argument that this case has survived through the years

and has been cited from time to time by other cases, all of which appear in the opinion of this court.

When we candidly asked this court to re-examine those cases, we did not mean to suggest that they simply be re-examined to determine whether or not the same language was being used with approval from time to time. In none of the cases citing *State vs. Payne,* supra, including this case, has this court ever examined the validity of the premise upon which *State vs. Payne* is based. It was our request that this be done and, sincerely believing it has not been done, we repeat the request.

The doctrine which grew out of *State vs. Payne,* and which is basically wrong, is simply this: The case assumes as a verity that "everyone is presumed to intend the natural and necessary results of his action"; it goes on to say "if he kills another, he must in the absence of showing to the contrary, be presumed to have intended to kill him". From this it is reasoned that once a killing is shown, it must necessarily be intentional. This is not true.

In the first place, insane or mentally irresponsible persons do not of necessity intend the results of their acts. So in a case such as this, where the defense of mental irresponsibility was interposed and some evidence offered in support of it, the very basis of the presumption disappears.

Secondly, it is not necessarily true that if it is shown

that one kills another that such killing is intentional. As pointed out above, there are a variety of other intentions or lack of intentions that can be connected with any killing.

Actually the court in *State vs. Payne* was very reluctant to espouse the doctrine which it did, pointing out that it was contrary to the writings of the leading authority on criminal law of the day, Professor Wharton. What the court did in *State vs. Payne* was to adopt the doctrine which it did, and which now finds expression in this case in the instructions given, not upon any principles of logic, common sense or justice, but upon the basis that it was expedient public policy to adopt the doctrine in order to aid the prosecution of unwitnessed homicides.

It was pointed out that in the absence of the presumption, if two men entered a room and one was killed, that the state would be helpless to prove a crime. We suppose that back in 1895 the detection and apprehension of criminals and the use of modern police methods were unknown, and the state probably would have had difficulty in some crimes in proving them. These would be crimes which today, under our modern methods, could be easily proven. With the improvement of the methods of detection and proof of crimes, there is no need for a public policy which deprives a defendant of his rights, simply because it might be difficult for the state to prove a crime

against him. No one should seriously argue with the proud boast of our system of law that it is better that ten guilty men go free than that one innocent man be punished. *State vs. Payne,* supra, does violence to that principle.

4.

THE GIVING OF INSTRUCTIONS NUMBERS 10, 15, AND 19 VIOLATED APPELLANT'S RIGHT TO DUE PROCESS GUARANTEED TO HIM UNDER THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION.

This constitutional question was raised by appellant in the trial court in his objections to the instructions mentioned and was further raised in appellant's brief to this court.

FAIR PLAY IS THE ESSENCE OF DUE PROCESS. *Galvan vs. Press,* 74 S. C. 737, 347 U. S. 522, 98 L. Ed. 911.

DUE PROCESS FORBIDS THE PLACING OF ANY BURDEN OF PROOF UPON DEFENDANT.

"Strictly speaking the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime." *Davis vs. U. S.,* 160 U.S. 469, 40 L. Ed. 499, at page 505.

THERE MUST BE A DIRECT AND LOGICAL

CONNECTION BETWEEN PRESUMED FACT AND ESTABLISHED FACT BASED UPON NORMAL HUMAN EXPERIENCE.

"But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not it is regarded as too remote." *Manning vs. Mutual Life Insurance Co.*, S.C. 10 Otto 693, 699, 25 L. Ed. 761.

"A presumption upon a matter of fact, when it is not merely a disguise for some other plan, means that common experience shows the fact to be so generally true the courts may notice the truth." Mr. Justice Holmes in *Greer vs. U. S.*, 245 U.S. 559, 62 L. Ed. 247, at page 472.

IF NO RATIONAL CONNECTION BETWEEN FACTS PRESUMED AND FACTS PROVED, THEN PRESUMPTION VIOLATES DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT.

In the case of *Mannley vs. State of Georgia*, 279 U.S. 1, 49 S. C. Reporter 215, 73 L. Ed. 575, the U. S. Supreme Court held that a statute was unreasonable, arbitrary and violative of the Fourteenth Amendment which presumed that any bank insolvency was fraudulent and placed upon the directors of such an insolvent bank the burden of repelling this presumption, and at page 578 stated as follows:

"Mere legislative fiat can not take the place of fact in the determination of issues involving life, liberty or property. The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other."

"Legislation declaring that proof of one fact or group

of facts which constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to appellant violates the due process clause of the Fourteenth Amendment." *Western & A. R. R. vs. Henderson*, 279 U.S. 639, 73 L. Ed. 516.

PRESUMPTIONS HAVE NO PLACE IN A CRIMINAL CASE WHERE SPECIFIC INTENT IS AN ESSENTIAL ELEMENT OF THE CRIME.

In the case of *Morissette vs. U. S.*, 342 U.S. 246, 72 S. C. 240, 96 L. Ed. 298, the trial court attempted to supply by presumption its claim that Morissette *intended* to steal the bomb casings which he took from the Government bombing range. The court vigorously struck down the Government's argument that presumptive intent, either conclusive or refutable, had a place in the Morissette case. Justice Jackson, at page 307 of 96 L. Ed., stated as follows:

"We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presump-

> tion of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary."

We respectfully submit that the facts in the case at bar are even stronger than those in the Morissette case.

CONCLUSION

Appellant respectfully urges that for the reasons hereinabove set forth the court should re-examine its opinion and the basis upon which it is founded, and that it should further carefully consider the infringement of appellant's constitutional rights guaranteed under the Fourteenth Amendment which will result if the opinion heretofore rendered in this case is permitted to stand.

Respectfully submitted,

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